Office Supreme Court, U.S.
FILED
SEP 9 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 227

ANTONIO CORALLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

MICHAEL P. PIRENZO
253 Broadway
New York 7, N. Y.
Counsel for Petitioner

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

IN THE

Supreme Court of the United States

October Term, 1963

No. 227

ANTONIO CORALLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

Petitioner, Antonio Corallo, respectfully petitions for a rehearing of the order of October 14, 1963, denying a writ of certiorari. By orders of November 7 and November 22, 1963, Mr. Justice Harlan extended petitioner's time in which to file a petition for rehearing to and including December 9, 1963. The instant proceedings for rehearing have not resulted in a stay of execution of petitioner's sentence of two years' imprisonment, no such stay having been sought; petitioner surrendered to begin serving his sentence on November 7, 1963, and he is presently incarcerated at Lewisburg.

I.

Petitioner, Antonio Corallo, is "the forgotten man" in this historic prosecution where prime attention has naturally focused upon his co-defendants of distinguished name. The elaborate opinion of the Court of Appeals affirming

the convictions contains relatively little mention of the Corallo sector of the case. This is understandable, on the one hand, in that it reflects the at-most peripheral implication of Corallo in the alleged happenings. On the other hand, this relatively minor attention which the Court below gave to Corallo in its opinion has the regrettable result of obscuring just how remote and tenuous was Corallo's alleged part in this case.

It is therefore our first respectfully tendered ground for rehearing that Corallo's conviction is, starkly, a miscarriage of justice on the sheer factual merits of the case—an injustice so fundamental as to entitle us to ask this Court to scrutinize the record once again, in the interests of the fair administration of Federal criminal justice. In asking the Court to do this we are not merely pleading for a "second chance" to argue our certiorari application, but we are making this request for specific reasons which seem to us meritorious and appropriate in the framework of a petition for rehearing:

Corallo was convicted solely on the testimony of accomplice witnesses. For all practical purposes, it is the testimony of two of these accomplices, Erdman and Moore, which formed the Government's case against Corallo.* But the difficulty with that "case" is that one of those two accomplice witnesses (Moore) flatly contradicted the other (Erdman) in so total a way that the Court below concluded that Moore "completely exculpated Corallo" (Pet. Cert. 27a).

* Even Erdman's testimony does not portray Corallo as one of the active "conspirators" but merely as at most an acquiescent or sympathetic spectator (Corallo App. 30a, 39a, 49a, 61a, 67a, 73a). The testimony of the accomplices Deutsch (Corallo App. 131) and Kerner (*id.* 150-153) added nothing of significance.

The situation thus presented is that the Government's "proofs" against Corallo completely cancelled themselves out. In other words, this is not the usual case of "conflicting evidence" where the defense proofs conflict with those of the Government. This is a case where the Government's own *probatum* accomplishes its own self-destruction under the rule of reasonable doubt—and indeed under the rule requiring the Government to prove a *prima facie* case for submission to the jury. The total self-contradictoriness in the Government's own case which here exists is to be evaluated, moreover, in the setting of accomplice testimony as the sole offered proof of guilt. Cf. the authorities collected in the "Reply Brief for Petitioner Elliot Kahaner", in No. 304 at this Term, where the evolution of the Federal rule as to corroboration of accomplice testimony is described, and the standards of corroboration are set forth.

There seems to be a dearth of authority on the question of the effect of conflict of testimony among the prosecution's own witnesses in criminal cases. In *People* v. *Nicosia*, 164 Misc. 152, 298 N.Y.S. 591 (Kings Co. Ct., 1937), the Court dismissed an indictment on the ground that the Grand Jury testimony of the two principal witnesses for the prosecution "is clearly inconsistent, and the burden is upon the prosecution to reconcile it, since the defendant is safeguarded with the presumption of innocence." The facts in *Nicosia* were far less favorable for the applying of this rule than is true in our case, where the inconsistency between Erdman and Moore is direct, total and decisive on the fundamental issue of guilt at all. The cases holding that the prosecution in a criminal case is not bound by the testimony of a witness whom it produces* seem to

* Eg., *United States* v. *Palese*, 133 F. 2d 660 (C.C.A. 3, 1943).

be confined to the Third Circuit; and, in any event, such decisions obviously do not reach the question of what evaluation shall be made of the Government's case by the Trial Court on a motion for acquittal where such conflict of testimony exists; nor, *a fortiori*, do such decisions reach the question of the evaluation of this kind of prosecutive *probatum* in terms of the rule of reasonable doubt. What we mean is that, even if the Government was not "bound" (whatever that word means) by Moore's exculpatory testimony in the instant case and was entitled to invoke the opposite testimony of Erdman, this still left the question of what the Trial Court in the first instance should have done about submitting the Government's totally self-contradictory case to the jury and about what the jury should have done under the rule of reasonable doubt.

We would respectfully also call to the Court's attention the suggestion advanced in the companion certiorari petition of Kahaner (No. 304) at page 34, as to the need for consideration by this Court of the proposals of Circuit Judge Jerome Frank in his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2, 1956), that the Federal Trial and Appellate Courts should determine whether a criminal case is improper for submission to the jury when reasonable men could not differ in believing that a reasonable doubt exists. But even under the conventional rule that the test for submission of a Federal criminal case to a jury is merely that of "*prima facie*" or "preponderant" proof, the instant case against Corallo should never have gone to the jury, because it is difficult to imagine a more indubitable example of absolutely manifest "reasonable doubt" built right into the very heart of the Government's own case than that which emerged

upon the record in this trial, where one of the Government's two vital accomplice witnesses said in effect that the defendant was innocent and that the other accomplice witness was lying.

II.

The seriously doubtful basis of the condemnation of petitioner Corallo as above suggested, makes it pertinent for us to call the Court's attention also to the recent expressions, on the editorial page of the New York Times of Sunday, December 1, 1963, in which the Editors of the Times and seven distinguished professors of criminal law at the Harvard Law School (in a letter to the Times which is printed on the aforesmentioned editorial page) called for a new juridical recognition of the injustice of what amounts in effect to criminal "trial" in this country by the mass public communications media of the present era. The editorial and professorial pronouncements in the Times of December 1, 1963 were evoked by the national disaster of the recent Presidential assassination and the publicity features of the case against Lee Oswald. It is unnecessary to remind this Court of the anguishing circumstances of pretrial publicity, and of "media" interference with the jurors even during the latter's deliberations, in the instant case. The public clamor which attended this case from its outset, and the orientation of the public mind towards pre-judgment of the guilt of the defendants in this sensationalized case, may perhaps now be re-evaluated by this Court. With particular acuteness in the case of Corallo, these considerations seem deserving of this Court's attention. Corallo is, as we said at outset, the "forgotten man" in this notable case, where the crusade-like process of the avenging of the charged

wrong against Governmental morality may well have led the jurors to take insufficient note of the significant details (*pro* and *con*) of the Corallo portion of the trial proofs.

The letter of the Harvard Lawschool professors above referred to (N. Y. Times, December 1, 1963, p. 10 E, Col. 8) reads as follows:

"*To the Editor of The New York Times*:

The undersigned, teachers of the administration of criminal justice at the Harvard Law School, would like to commend The New York Times for its excellent editorial of Nov. 25, commenting on the deplorable incidents in the Dallas police station ending in the death of Lee Oswald.

From Friday, Nov. 22, through Sunday the shocking manner in which our processes of criminal justice are often administered was exhibited to ourselves and to the world. Of course, there was a legitimate concern of the public to know promptly that investigations had been completed and a single suspect apprehended, and that responsible authorities had sufficient evidence to justify his arraignment and indictment.

But surely this could have been satisfied without turning the process of investigation and accusation into what can only be described as a public spectacle, carried on in the Dallas police station with its halls and corridors jammed with a noisy, milling throng of reporters and cameramen.

Access to News Media

Precisely because the President's assassination was the ultimate in defiance of law it called for the ultimate in vindication of law. The law enforcement agencies, in permitting virtually unlimited access to the news media, made this impossible. Not only

would it have been virtually impossible to impanel a jury which had not formed its own views on those facts which might come before it, but much of the information released, such as statements by Mrs. Oswald, might have been legally inadmissible at trial.

It is ironic that the very publicity which had already made it virtually impossible for Oswald to be tried and convicted by a jury meeting existing constitutional standards of impartiality should, in the end, have made such trial unnecessary.

We cannot comfort ourselves with the notion that this could have happened only in Dallas. It is too frequently a feature of our process of criminal justice that it is regarded as a public carnival. And this reflects our general obsession that everybody has a right immediately to know and see everything, that reporters and TV cameras must be omnipresent, that justice must take a second place behind the public's immediate "right to be informed" about every detail of a crime.

Incompatible With Justice

For the fact is that justice is incompatible with the notion that police, prosecutors, attorneys, reporters and cameramen should have an unlimited right to conduct *ex parte* public trials in the press and on television.

As long as we adhere to that notion, and as long as our legislatures and courts are unwilling to protect the processes of justice, we must recognize that the lamentable behavior of the Dallas law enforcement agencies and of the communications media reflect a flaw in ourselves as a society.

Paul M. Bator, Richard R. Baxter, Charles Fried, Robert A. Gerard, Henry M. Hart, Jr., Louis L. Jaffe, James Vorenberg.

Cambridge, Mass., Nov. 27, 1963."

CONCLUSION

It is respectfully submitted that this petition for rehearing should be granted.

Respectfully submitted,

MICHAEL P. DIRENZO
Counsel for Petitioner,
Antonio Corallo.

Certificate of Counsel

I hereby respectfully certify that the foregoing petition for rehearing on behalf of petitioner Antonio Corallo is presented in good faith and not for delay. No stay of execution of petitioner's sentence of imprisonment has been sought in connection with said petition for rehearing, and petitioner has been serving his sentence since November 7, 1963. I further certify that the within petition for rehearing is restricted to the grounds specified in Rule 58 (2) of the Rules of this Court, i.e. "other substantial grounds available to petitioner although not previously presented".

MICHAEL P. DIRENZO,
Counsel for Petitioner,
Antonio Corallo.